Date: December 23, 1996

Case No.: 95-INA-147

In the Matter of:

MRS. MARION MATROS for HILDE ISRAEL,
Employer

On Behalf Of:

CILLA JOINTE,
Alien

Appearance: Harry Spar, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 7, 1993, Mrs. Marion Matros for Hilde Israel ("Employer") filed an application for labor certification to enable Cilla Cooper Jointe ("Alien") to fill the position of Live-in Home Attendant (AF 10-11). The job duties for the position are, "[c]are of ill person. Attend to personal needs, shop, prepare meals, assist in feeding, bathing, dressing and grooming."

The only requirement for the position is eight years of grade school. There was no experience requirement stated. Other Special Requirements are "verifiable non-employment reference" and "non-smoker."

The CO issued a Notice of Findings on May 27, 1994 (AF 117-119), proposing to deny certification on the grounds that there are six qualified U.S. workers who, according to the Employer, were rejected for lack of willingness to work or for being unqualified based on their citizenship/residence. However, all six applicants responded, separately and independently, and denied that they were contacted and directly refuted the Employer's statements as to their rejection.

Accordingly, the Employer was notified that it had until July 1, 1994, to rebut the findings or to cure the defects noted.

The Employer's rebuttal consisted solely of a statement by its Attorney dated June 29, 1994 (AF 120-132).[2] Counsel for the Employer contended that the only issue is whom to believe, the Employer or the six U.S. applicants who responded to the State of New York survey.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] It is well settled that assertions by an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts, do not constitute evidence. *Modular Container Systems, Inc.,* 89-INA-228 (July 16, 1991) (*en banc*). See also, *API Industries, Inc.*, 93-INA-159 (Aug. 16, 1994); *Michael S. Sausman*, 93-INA-200 (Aug. 17, 1993); *E. Davis, Inc.*, 92-INA-277 (Aug. 4, 1993); *Hupp Electric Motors, Inc*., 90-INA-478 (Jan. 30, 1992); *Moda Linea, Inc.*, 90-INA-424 (Dec. 11, 1991). However, the record before us does include sufficient documents to support the arguments of Counsel, including the reports of recruitment signed by the Employer.

Counsel then states that three of the six U.S. applicants did not submit "verifiable non-employment references" as required by the recruitment advertisement, thereby negating the Employer's responsibility to arrange for personal interviews with them. Next, the Counsel listed detailed information regarding the contact of each of the six U.S. applicants, including whether or not the applicant is a U.S. citizen, availability and willingness to perform the advertised position, and the dates of the telephone calls.[3] Counsel stated that this information was obtained during telephone conversations with the six U.S. applicants. Finally, Counsel concluded that the Employer did make a diligent, good-faith effort to recruit U.S. workers, and the six U.S. applicants at issue were rejected solely for lawful, job-related reasons.

The CO issued the Final Determination on July 6, 1994 (AF 133-136), denying certification pursuant to 20 C.F.R. § 656. The CO stated that, "[d]espite our requirement that the employer rebut issues of availability, attorney's letter, dated June 29, 1994, was the only response received," which constitutes a failure to comply with 20 C.F.R. § 656.21(j). Nevertheless, the CO found that, based on the attorney's response, the Employer has not demonstrated a good-faith recruitment effort. The CO stated that the similarity of the responses from the six U.S. applicants at issue here appear to establish a pattern of rejection which does not support a position of good-faith recruitment by the Employer. .

On August 8, 1994, the Employer requested review of the Denial of Labor Certification (AF 137-152). On November 21, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.,*87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(7) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

Where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicants' statements, the CO may properly give greater weight to applicants' statements that they were not contacted. *Robert B. Fry, Jr.,* 89-INA-6 (Dec. 28, 1989); *Jersey Welding & Fence Co.,* 93-INA-43 (Oct. 13, 1993). Further, when several U.S. applicants make independent and similar assertions that they were not contacted as part of the employer's recruitment efforts, it is not unreasonable for the CO to accord the employer's own assertions less weight. See *Victory Knits, Inc.,* 92-INA-320 (July 20, 1993)*; Strategem Security, Inc.,* 92-INA-243 (Oct. 13, 1993).

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[3] Counsel does not note the date of the telephone call to U.S. applicant Arnold McKlevey.

In this case, the CO noted that six U.S. workers were qualified for the job opportunity, but were rejected for lack of willingness to work or for being unqualified based on their citizenship or residence. However, all six of these applicants responded separately and independently, denying that they were contacted and directly refuting the Employer's statements (AF 76, 79, 85, 87, 96, 98). Therefore, we agree that the CO properly accorded more weight to the assertions of the six applicants based on the similarity of their independent assertions.

Accordingly, we find that the Employer has failed to establish a good-faith effort to recruit qualified U.S. workers for the job opportunity. Thus, the CO's denial of the labor certification must be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of December, 1996, at Cincinnati, Ohio.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.